No. 89-1408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RANDALL TERRY, OPERATION RESCUE, REV. JAMES P. LISANTE, THOMAS HERLIHY, JOHN DOES AND JANE DOES,

Petitioners,

—v.—

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, *et al.*,

Respondents,

CITY OF NEW YORK,

Respondent-Intervenor,

UNITED STATES OF AMERICA,

Respondent-Judgment Creditor.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. Whether the 42 U.S.C. 1985(3) requirement of class-based animus is satisfied by a class of women in general or a subclass of women abortion-seekers?

II. Whether brief non-violent sit-in demonstrations of a few hours occurring on public sidewalks in front of facilities in which abortions are performed violate the interstate Right to Travel of the plaintiffs or the purported individual women they were allowed to represent?

III. Whether the contempt fines of $50,000 (originally payable to plaintiff National Organization for Women, modified by the circuit court to be payable to the United States) and $19,141 (payable to the City of New York for police overtime), imposed on motion papers without a hearing, against defendants Randall Terry and Operation Rescue for engaging in two days of public demonstrations at two separate locations, were criminal in nature requiring due process protections for the defendants?

IV. Whether there existed genuine disputes of substantial material facts so as to preclude the district court from granting summary judgment under the doctrine of *Anderson* v. *Liberty Lobby*, 477 U.S. 242 (1986)?

V. Whether public demonstrations containing elements of civil disobedience or individual acts of civil disobedience for political purposes may be treated in all respects as non-expressive conduct, deserving no First Amendment safeguards whatsoever?

VI. Whether the plaintiffs and plaintiff-intervenor lack Article III standing due to lack of a cognizable harm to any plaintiff?

VII. Whether the imposition of discovery sanctions against defendants and their *pro bono* counsel was an abuse of discretion in view of the constitutional privileges asserted?

PARTIES

In addition to the Petitioners and Respondents listed in the caption, the following are also Respondents in this action: New York City Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights-New York Metropolitan Area; New York State National Abortion Rights Action League, Inc.; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Planned Parenthood Margaret Sanger Clinic (Manhattan); Ob-Gyn Pavilion; The Center for Reproductive and Sexual Health; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin; Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan; Pro Choice Coalition.

The United States of America was added as a party as a result of the court of appeals judgment below. Petitioner OPERATION RESCUE is not a corporation under Rule 28.1 of the Rules of this Court.

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners Randall Terry, Operation Rescue,[1] Rev. James P. Lisante and Thomas Herlihy respectfully pray that a petition for a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

1 Operation Rescue is not a corporation under Rule 28.1 of the Rules of this Court. Its status as a separate entity was an issue in the courts below.

OPINIONS BELOW

The opinion of the court of appeals (set forth at pages A-1 to 52 of the Appendix to this Petition) is reported at 886 F.2d 1339 (2d Cir. 1989). The district court opinion on discovery and sanctions is unreported (set forth at pages A-56 to 74 of the Appendix). The district court opinion on contempt (set forth at pages A-78 to 103 of the Appendix) is reported at 697 F.Supp. 1324 (S.D.N.Y. 1988). The district court summary judgment opinion (set forth at page A-115 to A-143 of the Appendix) is reported at 704 F.Supp. 1247 (S.D.N.Y. 1989).

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1989 (A-151 to 152). The order of the court of appeals denying the petition for rehearing *en banc* was entered on November 7, 1989 (A-147 to 148). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). A timely motion for extension of time to file this petition to March 5, 1990, was granted by Mr. Justice Marshall on January 29, 1990, Application No. 89-534.

STATUTORY PROVISIONS

Section 1985(3) of Title 42 of the United States Code ("Section 1985(3)") is set forth at page A-153 to 154 of the Appendix.

STATEMENT OF THE CASE

The decision of the Second Circuit affirming with one modification five judgments and orders of the district court has created an unprecedented body of rulings in clear contradiction of binding precedents of this Court. Given the ongoing national debate over abortion and the First Amendment implications of the panel's opinion, Petitioners respectfully submit that the vital issues raised in this appeal should be addressed by this Court.

This case involves the validity of injunctions against anti-abortion demonstrations in the City of New York and its environs, which injunctions provide for a $25,000 fixed unconditional fine *against each individual* for its initial violation and a doubling of the fine for each successive violation, *i.e.*, $50,000, then $100,000, then $200,000, etc. Unconditional contempt fines imposed on motion papers without a hearing of $50,000 (originally payable to Respondent National Organization for Women, but modified by the panel to be payable to the United States) and $19,141 (to the City of New York for police overtime because of failure to give 12 hours advance notice of the exact location of the demonstration) have already been imposed against Petitioners Terry and Operation Rescue for violations.[2]

This case arises in the context of political action and public protests, including "Operation Rescue" blockades of abortion sites, as a result of the abortion of many millions of unborn children in the United States since 1973. Petitioners believe that human life is precious. The miracle of conception and growth of human life within a mother's womb has been scientifically observed, documented and described.[3] However, since *Roe* v. *Wade*, 410 U.S. 113 (1973), thousands of arrests and prosecutions for trespass and other state law violations have occurred nationwide. Hundreds have been arrested in the New York City area alone.

The United States experienced similar wrenching social upheaval and political division with the Civil Rights and Vietnam war protests of previous decades.[4] The evident and powerful result of deeply held beliefs by Americans has always been political protest and civil dissent. It is certain that abor-

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2 Subsequent to the affirmance by the Second Circuit, the United States became a party to this action as Judgment Creditor of the $50,000 contempt fine and has vigorously pursued collection of this judgment, seizing the Christmas payroll of Operation Rescue on December 22, 1989.

3 *New Perspectives on Human Abortion*, Part I, Sec. 2: E. Blechschmidt M.D., *Human Being from the Very First* (1981).

4 Lambak, *Necessity and International Law: Arguments for the Legality of Civil Disobedience*, 5 Yale L. & Pol'y Rev. 472, 480-81 (1987).

tion is the most divisive public issue of the last two decades,[5] perhaps the greatest national political and moral question since slavery.

In this case the district court granted summary judgment against the petitioners under the Ku Klux Klan Act, 42 U.S.C. Section 1985(3). The demonstrators were held to have had an invidiously discriminatory animus against a subclass of "women seeking abortions," violating their interstate Right to Travel, although it was evident that the demonstrations were aimed at the general public, and no evidence of any individual women whose interstate Right to Travel is claimed to have been violated was offered.

The following remarks of Justice O'Connor are appropriate as a prism through which the lower courts' decisions in this case may be viewed:

> Today's decision goes further, and makes it painfully clear that *no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving* state regulation of *abortion.*
>
> * * *
>
> In so doing, the Court *prematurely decides serious constitutional questions on an inadequate record, in contravention of settled principles of constitutional adjudication and procedural fairness.* The constitutionality of the challenged provisions was not properly before this Court. There has been *no trial on the merits, and appellants have had no opportunity to develop facts that might have a bearing on the constitutionality* of the statute.
>
> * * *
>
> *Appellants should not have to prove that they are entitled to an opportunity to be heard.* (Emphasis added)

Thornburgh v. American Coll. of Obst. and Gyn., 476 U.S. 747, 814-816 (1986) (O'Connor, J., dissenting). Through numerous denials of Petitioners' requests for hearings, and a

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5 *Webster* v. *Reproductive Health Services, et al.*, 492 U.S. _____, 106 L. Ed.2d 410, 463 (1989) (Blackmun, J., dissenting and concurring in part).

misuse of the summary judgment procedure, the lower courts have repeatedly denied the Petitioners their entitled opportunity to be heard on constitutional issues of national import.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit Erroneously Held That Subgroupings of Gender-Based Animus Come Within the Purview of § 1985(3)

By finding that a subgrouping of gender, "women seeking abortions," was a sufficient class for § 1985(3), the Second Circuit has rejected the caution expressed by this Court in *United Broth. of Carpenters and Joiners, Local 610* v. *Scott*, 463 U.S. 825, 835 (1983), where this Court specifically refused to affirm that § 1985(3) "reaches conspiracies other than those motivated by racial bias." If it does, then this Court should say so and why.

The central dispute of this appeal involves 42 U.S.C. Section 1985(3) (1976 ed., Supp. V), The Ku Klux Klan Act of 1871.[6] The subject matter is abortion. Intervention by this Court is critical at this time to clarify the boundaries of the meaning of "class of persons" and "invidiously discriminatory animus," in an manner that lower federal courts can not mistake. The strongly worded cautions of this Court in *United Brotherhood of Carpenters and Joiners, Local 610* v. *Scott, supra*, are now being completely ignored by circuit courts, most stridently by the Second Circuit in this case.

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6 A *prima facie* case for relief under 42 U.S.C. Section 1985(3) must consist of alleging at least four necessary elements:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law; (3) an act of furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

United Board of Carpenters and Joiners, Local 610 v. *Scott, supra*, at 828-29 (1983) (restating the test first formulated in *Griffin* v. *Breckenridge*, 403 U.S. 88, 102-03 (1971)).

The chart below sets forth in graphic terms the broad nationwide circuit conflict and resulting confusion over the application of Section 1985(3).

CIRCUIT	CLASS BASED ANIMUS
First	No circuit cases reach this issue
Second	Extremely broad view that women in general constitute a class as well as a subgrouping of "women seeking abortions" and wide standard of animus;[7] Religion;[8] political affiliation[9]
Third	Intra-circuit conflict: open question on class,[10] Sex[11]
Fourth	Intra-Circuit Panel Conflict; Race only;[12] Race & Religion;[13] Race, National Origin & Sex.[14]

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7 *N.Y. State Nat. Organization for Women* v. *Terry*, *supra* (A-37 to 43). Expansive view that "animus merely describes a person's basic attitude or intention." (A-42) *Cousins* v. *Terry*, 721 F.Supp. 426 (N.D.N.Y. 1989) (women seeking abortions).

8 *Colombrito* v. *Kelley*, 764 F.2d 122, 130-131 (2nd Cir. 1985).

9 *Keating* v. *Carey*, 706 F.2d 377, 386-388 (2nd Cir. 1983).

10 *Robinson* v. *Canterbury Village*, 849 F.2d 424, 430, n.7 (3rd Cir. 1988) (but non-minority employee speech against racist employer practices is sufficient, citing prior case).

11 *Novotny* v. *Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235, 1243-44 (3rd Cir. 1978) (*en banc*), *rev'd on other grounds*, 442 U.S. 366 (1979); *Roe* v. *Operation Rescue*, 710 F.Supp. 577, 581 (E.D. Pa. 1989) (following *Novotny*, "women seeking abortions" approved).

12 *Harrison* v. *KVAT Food Management Inc.*, 766 F.2d 155 (4th Cor. 1985) (in depth analysis of Congressional intent and *Scott*: race only); *Mears* v. *Town of Oxford, M.D.*, 762 F.2d 368 (4th Cir. 1985) (race only)

13 *Trerice* v. *Summons*, 755 F.2d 1081, 1085 (4th Cir. 1985).

14 *Bushi* v. *Kirven*, 775 F.2d 1240, 1257 (4th Cir. 1985); *NOW* v. *Operation Rescue*, Civil Action No. 89-1558-A, slip op., 1989 U.S. Dist. Lexis 14919 at 21-22 (D.Va. December 6, 1989) (following *Bushi*, "women seeking abortions" approved).

Fifth	Intra-Circuit Conflict: 1) Race only;[15] 2) Race & Religion;[16] 3) Race, National Origin, Sex & and political beliefs and associations;[17] 4) Rejected women of childbearing age seeking medical attention [abortions].[18]
Sixth	Racial and Political classes.[19]
Seventh	Intra-Circuit panel conflict: 1) Race only;[20] 2) Race, Sex, Religion, Ethnicity, and Political Loyalty.[21]
Eighth	Sex and Ethnicity.[22]

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15 *Daigle* v. *Gulf Utilities Co.*, Local 2286, 794 F.2d 974, 978-79 (5th Cir. 1986); *Eitel* v. *Holland*, 787 F.2d 995, 1000 (5th Cir. 1986); *Rayborn* v. *Mississippi State Board of Dental Examiners*, 776 F.2d 530, 532 (5th Cir. 1986).

16 *Roe* v. *Abortion Abolition Society*, 811 F.2d 931, 933-936 (5th Cir. 1987) (rejected class of those who do not share the defendant's anti-abortion views based on religion; protected classes are race and possibly religion).

17 *McLean* v. *International Harvester Co.*, 817 F.2d 1214, 1218-1219 (5th Cir. 1987) (caution beyond race, but cited pre-*Scott* Fifth Circuit cases allowing classes of 1) immutable characteristic such as race, national origin or sex; and 2) political beliefs and associations).

18 *Mississippi Women's Medical Clinic* v. *McMillan*, 866 F.2d 788 (5th Cir. 1989) (class of "women of childbearing age who seek medical attention from the [plaintiff clinic]" was "so under-inclusive as to mischaracterize the dispute" and *did not* constitute a proper class. Insufficient "class-based invidiously discriminatory animus" as "the animus of the protestors is to dissuade *anyone* who contributes to the incidence of abortions," including "men, women of all ages, doctors, nurses, staff, the female security guards, etc." *Id.* at 794-95. The Petitioners in the case at bar have this identical broad animus).

19 *Conklin* v. *Lovely*, 834 F.2d 543, 549 (6th Cir. 1987).

20 *Damato* v. *Wisconsin Gas Co.*, 760 F.2d 1474 (7th Cir. 1985) (rejecting class of handicapped, race only); *Grimes* v. *Smith*, 776 F.2d 1359 (7th Cir. 1985) (race only).

21 *Volk* v. *Koler*, 845 F.2d 1422, 1434 (7th Cir. 1988).

22 *Conroy* v. *Conroy*, 575 F.2d 175, 177 (8th Cir. 1978).

Ninth	Intra-Circuit Panel Conflict: 1) Race only;[23] 2) Sex;[24] and 3) Classes granted special protection by Congress or courts.[25]
Tenth	Restricted to race, in accordance with Congressional intent and this Court's decision in *Scott, supra.*[26]
Eleventh	Race alleged; issue at beyond race not reached[27]
D.C.	Race and Political affiliations with Racial overtones.[28]

The range of class-based animus currently extends from a strict adherence to race, all the way to women in general and especially women "abortion seekers". Of all the circuit courts, the Second Circuit, by its reasoning, has cast Section 1985(3) the furthest into uncharted waters:

> By its very language § 1985(3) is necessarily tied to *evolving notions of equality and citizenship.* As conspiracies directed against women are inherently invidious, and repugnant to the notion of equality of rights for all citizens, they are therefore encompassed under the Act. (Emphasis added) (A-40)

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23 *Gibson* v. *United States*, 781 F.2d 1334, 1341 (9th Cir. 1986) (race only); *National Abortion Federation* v. *Operation Rescue*, 721 F.Supp. 1168 (C.D.Cal. 1989) (rejecting "women seeking abortions").

24 *Reichard* v. *Life Ins. Co.*, 591 F.2d 499, 505 (9th Cir. 1979) (a class of women in general who purchase disability insurance); *Portland Feminist Women's Health Center* v. *Advocates for Life, Inc.*, 712 F.Supp. 165, 169 (D.Or. 1989) (following *Reichard*, "women seeking abortions" approved).

25 *Schultz* v. *Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985) (beyond race if Congress or courts have given class special protections).

26 *Wilhelm* v. *Continental Title Co.*, 720 F.2d 1173, 1177 (10th Cir. 1983); *Brown* v. *Reardon*, 770 F.2d 896 (10th Cir. 1985).

27 *Brown* v. *Masonry Products, Inc.*, 874 F.2d 1476 (11th Cir. 1989). *Arnold* v. *Board of Educ. of Escambia County, Ala.*, 880 F.2d 305 (11th Cir. 1989).

28 *Hobson* v. *Wilson*, 737 F.2d 1, 21 (D.C. Cir. 1984); *Bois* v. *Marsh*, 801 F.2d 462 (D.C. Cir. 1986) (Open question beyond racial animus, but dissent would hold gender discrimination within Section 1985(3)).

Contrast this open-ended jurisprudence to the more prudent approach of the Tenth Circuit:

> In summary as to the *Scott* opinion, we find nothing therein to give any encouragement whatever to extend . . . [Section] 1985 to classes other than those involved in the strife in the South in 1871 with which congress was then concerned. In fact from *Scott* we get a signal that the classes covered by . . . [Section] 1985 should not be extended beyond those already expressly provided by the Court.[29]

Despite the cautions from this Court in *Griffin*[30] and *Scott*[31], the Second Circuit has brashly ignored the wisdom of limiting Section 1985(3). While giving lip service to Congressional intent and *Scott*, the Second Circuit has vastly extended the reach of this statute to protect almost any conceivable subgroup of the majority of the American population, recklessly opening a Pandora's Box of claims and claimants Congress never intended to be covered by the statute. *Wilhelm*, 720 F.2d at 1176; *Harrison*, 766 F.2d at 161. Combined with a broad reading of animus—defined as a "person's basic attitude or intention"—any subgroup of a generally protected class, regardless of its limit or description can now obtain Section 1985(3) relief, even though a conspiracy may only tangentially affect them. Section 1985(3) is thus transformed into the "general federal tort law" this Court warned against in *Scott*, 463 U.S. at 834.

Judge A. Wallace Tashima has cogently explained why this same class of "women seeking abortions is not a class intended to be protected by the Ku Klux Klan Act."[32]

> The Court disagrees with the proposition that any "particular [sub]class of women," *id.*, is a protected class.

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29 *Wilhelm* v. *Continental Title Co.*, 720 F.2d 1173, 1176 (10th Cir. 1983).

30 *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971).

31 *United Brotherhood of Carpenters and Joiners, Local 610* v. *Scott*, 463 U.S. 825 (1983).

32 *National Abortion Federation* v. *Operation Rescue*, 721 F.Supp. 1168, 1170 (C.D. Cal. 1989).

> For if the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based, it separates persons of the same gender from each other and, obviously, on a basis other than by gender. *The inquiry*, thus, *must be made without respect to gender, i.e.*, it is the *"seeking abortion" trait which animates the defendants' actions* and must be the basis for making the . . . [Section 1985(3)] analysis.[33] (Emphasis added).

This "abortion seeker" rationale reflects the factual reality of Operation Rescue demonstrations. The general class of women the Second Circuit attempted to create had no relationship to the Petitioners' actions and should be rejected by this Court.

As this Court has held:

> [T]here must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.[34]

Petitioners respectfully urge this Court to define the parameters of "animus." Is it merely "a person's basic attitude or intention,"[35] or is it "ill-will" or "a prejudice against a group of persons or against a particular person because of his membership in that group"?[36] And should not "the class

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33 721 F.Supp. at 1171. In footnote 4 to this section, Judge Tashima notes the illogical extension of this argument. If women are a protected class, then all subclasses of women are protected. Likewise, if men are an unprotected class, then all subclasses of men are unprotected. "Therefore, *e.g.*, a class of homosexual women would be protected, but a class of homosexual men would not be." *Id.* at 1171 n.4.

34 *Griffin* v. *Breckenridge*, *supra*, 403 U.S. at 102.

35 *N.Y. State Nat. Organization for Women* v. *Terry*, *supra*, (A-42).

36 *Roe* v. *Abortion Abolition Society*, 811 F.2d 931, 934 (5th Cir. 1987).

animus alleged be consistent with the deprivation of rights alleged."[37] The Petitioners submit that the animus or motivation of the conspiracy, *i.e.*, "those at whom the conspiracy was aimed" is the proper interpretation.[38]

In this case not only is the class of "women seeking abortions" inappropriate, but the alleged "animus" against them is wholesale fiction. Truth has come full circle where peaceful non-violent pro-life demonstrators, many of whom are praying for abortion seekers, are charged with animus against women similar to the Ku Klux Klan's hatred of Blacks and their supporters. Not only is the parallel wholly lacking, the application of the Ku Klux Klan Act against them is an unprincipled legal fiction of technical form and only serves to keep the federal courts embroiled in abortion litigation in the Post-*Webster* era in a manner that was not intended by Congress.[39]

II. The Second Circuit Erroneously Held That Brief Non-Violent Sit-In Demonstrations on Public Sidewalks Implicate The Right to Travel.

Relying on a holding from *Doe* v. *Bolton*, 410 U.S. 179, 200 (1973), that State residency requirements for abortions are inconsistent with the Privileges and Immunities Clause, together with a reference to the right against private discrimination created by the Supreme Court in *Griffin* v. *Breckenridge*, 403 U.S. 88, 105-06 (1971), the Second Circuit concluded that the Petitioners' sit-in demonstrations on public sidewalks have denied the Respondents' constitutional Right to Travel (A-43 to 44).

As a threshold matter, there is no Right to Travel case factually analogous to Rescue demonstrations of the type involved in this case. Such decisions involve infringement of the Right to Travel by state action, principally through dis-

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37 *Lopez* v. *Arrowhead Ranches*, 523 F.2d 924, 928 (9th Cir. 1975).

38 *Mississippi Womens' Medical Center* v. *McMillan*, 866 F.2d 788, 794 (5th Cir. 1989).

39 *Webster* v. *Reproductive Health Services*, 492 U.S. _____, 106 L.Ed.2d 410 (1989).

criminatory residency requirements.[40] The Right to Travel in its classic meaning ensures new residents the same right to *vital governmental benefits and privileges* in the states to which they migrate as they are enjoyed by other residents. *Califano* v. *Gautier Torres*, 435 U.S. 1 (1978).

In analyzing Rescue demonstrations, Judge Tashima has commented: "Whatever other legal rights and liabilities may be implicated by such conduct, there is no federal privilege or immunity of one class of persons not to have another class of persons engage in non-violent, civil disobedience."[41]

In the present case, Respondents did not draw any evidence of denial of the Right to Travel to any specific identifiable women. The case rests solely on the *generalized* allegation of *possible* impacts on some women who *may* perceive some difficulty in obtaining an abortion in another jurisdiction. Furthermore, it is clear that out-of-state abortion seekers are treated no differently than those in the State of New York.

Under the decision of the Second Circuit, even if the constitutional right to an abortion is reversed, Section 1985(3) and the Right to Travel will become the vehicle not only for a continuing onslaught of future abortion litigation but for use against every other minority movement that espouses unpopular positions. The federal courts will be even further embroiled, this time as "the monitors of . . . [anti-abortion demonstration] tactics" rather than "campaign tactics," the very situation this Court wisely avoided seven years ago.[42]

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40 *See e.g.*, *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). *Attorney General of New York* v. *Soto-Lopes*, 476 U.S. 898 (1986).

41 *National Abortion Federation* v. *Operation Rescue*, No. CV 89-1181 (AWT) slip op. at 7 (C.D. Cal. January 31, 1990) (dismissing amended complaint with prejudice).

42 *United Brotherhood of Carpenters and Joiners, Local 610* v. *Scott*, *supra* 463 U.S. at 836 (emphasis added). This Court was so clear in *Griffin* that the Ku Klux Klan Act was never "intended to apply to all tortious, conspiratorial interferences with the rights of others." *Griffin* v. *Breckenridge*, *supra* 403 U.S. at 101. *United Brotherhood of Carpenters and Joiners, Local 610* v. *Scott*, *supra*, 463 U.S. at 834.

The contention that non-violent sit-in demonstrations on public sidewalks involving hundreds of volunteers of conscience, gathering to protest abortion, rises to a purposeful constitutional violation of the interstate Right to Travel, is nothing short of constitutional ambrosia—the creation of a Federal cause of action where none exists.

III. The Second Circuit Erroneously Held That The Contempt Fines Imposed by The District Court Were Civil in Nature

On October 27, 1988, the district court held the Petitioner Randall Terry and Operation Rescue in contempt, ruling on motion papers and denying the Petitioners' request for a hearing or even an oral argument (A-78 to 103). The Petitioners submit that the unconditional imposition of the $50,000 ($25,000/day, originally payable to Respondent N.O.W. and modified by the panel to be payable to the United States) and $19,141 (payable to the City of New York for police overtime for failure to give 12 hours advance notice of the exact location of the demonstration) fines made the contempts criminal in nature, since there was no purge mechanism available to the Petitioners to comply with and escape the sanctions (A-104 to 108).

The panel reasoned that since the district court added the $25,000 sanction to its injunction *before* the Petitioners violated the TRO, the Petitioners' opportunity to comply necessarily came at that initial point (A-22 to 23). This rationale cannot be reconciled with the settled contempt jurisprudence of this Court. A recent decision of this Court summarized a century's worth of this Court's settled contempt jurisprudence:

> *If the relief provided is a fine*, it is remedial when it is paid to the complainant, and *punitive when it is paid to the court*, though a fine that would be payable to the court is also remedial when the petitioner *can avoid paying* the fine simply by performing the affirmative act required by the court's order. These distinctions lead up to the fundamental proposition that *criminal penalties may not be imposed on someone who has not been*

> *afforded the protections that the Constitution* requires of such criminal proceedings, . . . An *unconstitutional penalty is criminal in nature because it is "solely and exclusively punitive in character." Penfield Co.* v. *SEC*, 300 U.S. 585, 593, 67 S.Ct. 918, 922 91 L.Ed. 1117 (1947). * * * This Court ruled that since the man was not tried in a proceeding that afforded him the applicable constitutional protections, he could be given a conditional term of imprisonment *but could not be made to pay 'a flat, unconditional fine* of $50.00." *Penfield, supra.*

Hicks on Behalf of Feiock v. *Feiock*, 485 U.S. 624, 632-33 (1988) (citations omitted) (emphasis added). The unconditional and punitive nature of the $50,000 and $19,141 fines are manifest.

The fact that the lower courts have conveniently denominated their penalty "civil coercive contempt" (A-22 to 23) is not controlling and should not be allowed to defeat applicable protections of federal constitutional law. *Hicks* v. *Feiock*, *supra*, 485 U.S. at 631. The unconditional character of the court's contempt orders made the contempt criminal. Since none of the due process protections, required in criminal proceedings, were afforded Petitioners Randall Terry and Operation Rescue, the contempt judgments must be reversed. *Young* v. *U.S. Ex Rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 798-99 (1987).

In the decision below, the Second Circuit stated "[a]bsent the threat of imprisonment, the Constitutional due process protections generally are not required in a civil contempt proceeding." (A-21) This analysis reveals the unorthodox view that due process protections are generally inapplicable to situations involving monetary sanctions. Nothing could be further from this Court's jurisprudence.[43]

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43 *Penfield* v. *Securities & Exchange Commission*, 330 U.S. 585, 592-595 (1947) (an unconditional $50.00 fine was a criminal sanction), *Union Tool* v. *Wilson*, 259 U.S. 107, 110 (1922), (a $2,500 fine payable to the court was a criminal sanction); *Nye* v. *United States*, 313 U.S. 33, 34 (1941) (unconditional fines payable to the United States carry the criminal hallmark); *Hicks* v. *Feiock*, *supra*.

Regarding unconditional versus conditional sanctions, this Court has often stated that a civil contempt sanction must have a mechanism whereby the contemnor can subsequently comply with the court's order and thereby purge himself of the contempt. *See*, *Shillitani* v. *United States*, 384 U.S. 364, 371 (1966); *Hicks* v. *Feiock*, *supra*; *Penfield* v. *Securities & Exchange Commission*, *supra*. On December 9, 1988 and November 3, 1988, when unconditional contempt judgments and fines against the Petitioners were entered, there was nothing the Petitioners could have done to purge themselves of the contempt (A-104-105, 107-108). The judgments were, therefore, *ipso facto*, criminal in nature.

The criminal nature of the contempt judgments is revealed by their punitive quality (to vindicate the authority of the court), and not as "remedial, and for the benefit of the complainant." *Gompers* v. *Buck's Stove & Range*, 221 U.S. 418, 441 (1911). The Second Circuit's decision is replete with pejorative references to the Petitioners' purported defiance (A-21 to 26). The fact that the Second Circuit modified the November 3, 1988 $50,000 Judgment to be payable to the court (the United States) and not to the private Respondent N.O.W., makes the judgment more clearly punitive in nature and not remedial and for the benefit of the complainant. Moreover, the fines are clearly "intended as a deterrent to offenses against the public"[44] and "to punish the act of disobedience as a public wrong."[45]

The Second Circuit's holding that the petitioners' opportunity to comply with the order came *before* a violation occurred only manifests, in a *tour de force* manner, the pejorative comments of Justice O'Connor in *Thornburgh*, *supra*. The purge mechanism doctrine comes into play *after* a party is adjudged in contempt, so that the sanction is imposed *with conditions* which allow the contemnor to escape the sanction by compliance with the order. This case involves, however, violations of orders to refrain from prohibited action which

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44 *Nye*, *supra*, 313 U.S. at 42. See Second Circuit discussion at A-51 (public health and safety at risk).

45 *Michaelson* v. *United States*, 266 U.S. 42, 65 (1924).

cannot be purged; the only appropriate response of a court is to punish past conduct, which is classic criminal contempt.[46]

These conditionality and purge mechanism requirements for civil contempt have been uniformly followed by other circuit courts,[47] as well as other Second Circuit decisions.[48] Apparently then, the only reason they were not applied here is the grim reality that in cases involving abortion, "a permissible reading of the [law] is to be avoided at all costs." *Thornburgh*, *supra* 476 U.S. at 812 (White, J., dissenting).

IV. The Petitioners Have Been Denied A Fair Trial on Constitutional Issues

The preemptive summary judgment upheld by the Second Circuit has denied the Petitioners an opportunity for a complete hearing with discovery on the complex factual and constitutional issues in this case, dealing with the Right to Travel, the First Amendment, the defense of "necessity" to protect human life, and the right to privacy-abortion. Other than a limited hearing with regard to issuance of a preliminary injunction, held on October 25 and 27, 1988, the trial court has effectively denied the Petitioners a full evidentiary hearing on the permanent injunction, and has tried the case and rendered judgment in favor of the Respondents on the basis of mere affidavits presented by Respondents' employees, which are flawed by hearsay and legal conclusions (A-192 to 203). Because genuine issues of material fact remain

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46 *See also*, *Crozer-Chester Medical Center* v. *Moran*, 560 A.2d 133 (Pa. 1989) (contempt against anti-abortion protester adjudged to be criminal).

47 *Douglas* v. *First National Realty Corp.*, 543 F.2d 894 (D.C. Cir. 1971); *United States* v. *Miller*, 540 F.2d 1213 (4th Cir. 1976); *United States* v. *Spectro Foods*, 544 F.2d 1175 (3rd Cir. 1976); *United States* v. *North*, 621 F.2d 1255 (3rd Cir. 1980); *In re: Stewart*, 571 F.2d 958 (5th Cir. 1978); *Falstaff* v. *Miller*, 702 F.2d 770 (9th Cir. 1983).

48 *In Re Grand Jury Witness*, 835 F.2d 437, 442 (2d Cir. 1987) *cert. denied sub nom. Arambulo* v. *United States*, 485 U.S. 1039 (1988) (stating a $50,000 fine was clearly criminal contempt); *U.S.* v. *Ayers*, 866 F.2d 571 (2nd Cir. 1989) (determinate sentence vacated because of absence of purge mechanism); *Hess* v. *New Jersey Transit Rail Operations, Inc.*, 946 F.2d 114 (2d Cir. 1988) (unconditional fine vacated).

unresolved, the district court's action, as affirmed by the circuit court, therefore, *conflicts* with existing authority and decisions of this Court.

In its summary judgment decision, the district court noted the Petitioners were not entitled to further discovery because they had "presented no evidence in their papers opposing summary judgment that would bring into question the undisputed facts on the record." (A-137 n.17) This reasoning is inexplicably narrow, in view of the fact that at the hearing of October 25 and 27, the Petitioners—despite their strenuous objection—were required by the court to put their witness and evidence on *first*, in response to the bare allegations contained in Respondents' supporting affidavits. (A-281 to 285) Petitioners' witnesses, point by point, refuted the Respondents' affidavits at that hearing (Dr. Bernard Nathanson (medical) at A-204 to 225 and Dr. Stephanie O'Callaghan (psychological and emotional) at 237 to 250). In spite of this clear factual conflict, the lower court has refused the Petitioners a reasonable opportunity to conduct discovery. *See*, Respondents' Complaint at ¶ 42 (A-164); Petitioners' Answers at ¶ 42 and ¶ 63 (A-180, 182, 188, 190).

Constitutional questions and issues of public importance should be decided only with a properly developed factual predicate, and "where the record is inadequate for the constitutional question presented or there are genuine factual issues, a motion for summary judgment should be denied." 6(2) J. Moore, *Moores Federal Practice* Sec. 56.17(10) (1988). *See*, *Board of Education, Island Trees Union Free School District No. 26* v. *Pico*, 457 U.S. 853 (1982). In *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 473 (1962), involving questions as to motive and intent, this Court said that "[t]rial by affidavit is no substitute for trial by jury which has so long been the hallmark of 'even handed justice.' " *White Motor Company* v. *United States*, 372 U.S. 253, 259 (1963). *See also*, *Motown Record Corp.* v. *Mary Jane Girls, Inc.*, 118 F.R.D. 35, 37 (S.D.N.Y. 1987).[49]

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49 In *Donahue* v. *Windsor Locks Bd. of Fire Com'rs.*, 834 F.2d 54, 58 (2d Cir. 1987), dealing with a 42 U.S.C. Sec. 1983 action involving alleged Freedom of Speech violations, Judge Kaufman, speaking for the panel,

Petitioners' intent in conducting the demonstrations in this case has been to protest abortion, to defend unborn human life and to advise and protect mothers concerning the immediate and long term consequences of abortion. This intent was directly at issue below—indeed, a finding of class-based animus was critical to upholding federal jurisdiction over Respondents' claims. *N.Y. State Nat. Organization for Women* v. *Terry* (A-41 to 43). The Petitioners, however, have been denied a full hearing in contravention of the holding in *Poller*, *supra*, and following cases.

The Petitioners' threshold evidence presented at the preliminary hearing on October 25 and 27, 1988, in the testimony of Dr. Nathanson and Dr. O'Callaghan, (A-204 to 250) refuted in detail the claims of the Respondents' supporting affidavits regarding endangerment of the mothers' health and demonstrated that "genuine issue(s) of material fact" remained for discovery and trial. *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). Despite the existence of disputed issues of "material fact," the district court entered summary judgment in favor of the Respondents. This is impermissible, for as this Court has recently stated: "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).[50]

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noted that summary judgment must "be used selectively to avoid trial by affidavit." (citing *Judge* v. *City of Buffalo*, 524 F.2d 1321 (2d Cir. 1975). *See also*, *City of Los Angeles* v. *Preferred Communications*, 476 U.S. 480 (1986) (reversing a dismissal because of inadequate record for First Amendment claims).

50 Similarly, the Second Circuit has observed that upon motion for summary judgment, a court " 'cannot try issues of fact; it can only determine whether there are issues to be tried.' " *Donahue* v. *Windsor Locks Bd. of Fire Com'rs.*, 834 at 58. "When the Court considers a summary judgment motion, it must draw all reasonable inferences and resolve all ambiguities in favor of the non-moving party." *Garza* v. *Marine Transport Lines, Inc.*, 871 F.2d 23, 26 (2d Cir. 1988); *City of Yonkers* v. *Otis Elevator Co.*, 844 F.2d 42, 45 (2d Cir. 1988).

Equally important, the district court has prematurely decided "serious constitutional questions on an inadequate record, in contravention of settled principles of constitutional adjudication and procedural fairness." *Thornburgh* v. *American Coll. of Obst. and Gyn.*, 476 U.S. 747, 815. (O'Connor, J., dissenting). The Petitioners have been summarily denied the opportunity to properly and fully present their case and, in particular to refute the Respondents' generalized and unsupported claims that the right to abortion is unduly burdened, or that the Right to Travel is abridged, let alone adversely affected, by Petitioners' Rescue activities.

The constitutional and factual questions of this case deserve a full trial and scrutiny under the discovery process. To do otherwise, would deny the Petitioners a fair adjudication, establishing a pattern of truncated, *pro forma* summary judgments for a "special" class of cases in which abortion is challenged as a matter of fact or law.

V. Petitioners' First Amendment Rights Have Been Violated By Court Orders That Imposed Unlawful Prior Restraint of Protected Speech

Petitioners' practice of non-violent sit-ins and protests is aimed at temporarily closing the entrance of abortion centers and passively demonstrating, including displaying placards, wearing armbands, counseling, persuading, singing and praying.

Operation Rescue volunteers, as a matter of conscience and deeply held personal conviction, seek to directly save the life of unborn children scheduled for abortion and to turn the heart of the nation, its legislators and jurists away from the practice of abortion on demand, through legislation and legal decisions. (A-256 to 280)

Operation Rescue specifically directs its participants in writing that all demonstrations will be peaceful and passive in nature, and requires each demonstrator to sign a pledge of non-violence. (A-257 to 258, 270 to 271) Rescues conducted in the New York City area have in fact been non-violent and peaceful.

Although under existing Supreme Court decisions, the non-violent activity of temporarily blocking entry to an abortion center is not of itself protected by the First Amendment, *Adderly* v. *Florida*, 385 U.S. 39 (1966); *Cox* v. *Louisiana*, 379 U.S. 536 (1965), the peaceful presence of demonstrators, the display of placards, and other demonstration activities such as singing, prayer, counseling and vocal persuasion, fall directly within the ambit of activity historically protected by the First Amendment. *E.g.*, *Hague* v. *CIO*, 307 U.S. 496 (1939); *United States* v. *Grace*, 461 U.S. 171 (1983); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963). The question which arises in this case is: Shall public demonstrations containing elements of civil disobedience or individual acts of civil disobedience for political purposes be treated in all aspects as non-expressive conduct, deserving no First Amendment safeguards whatsoever? The reach of constitutional constraints, *if any*, on court or police action in regard to demonstrations such as Operation Rescue which include expressive conduct and non-violent acts of civil disobedience, will turn on this issue.

A. Coercive Fines, Content Discrimination And Prior Restraint

In proceedings below, the district court has issued injunctions and penalties, striking at the political content of Petitioners' message, chilling the First Amendment arena with broad restraints, buttressed by huge fines. On May 4, 1988, attorneys for Respondents and Petitioners herein appeared before the Honorable Robert J. Ward, U.S.D.J. Southern District of New York, to argue a show cause for violation of a TRO against Petitioners' sit-in demonstrations at New York City abortion clinics (during the period of May 1-6, 1988) originally entered by the Supreme Court of the State of New York on April 28, 1988. Without hearing evidence of irreparable harm, Judge Ward adopted the Temporary Restraining Order issued against Petitioners by the New York State Court, and additionally modified it by adding a prospective $25,000 per day fine for violation of the TRO provisions,

together with costs expended by the City of New York for police presence at the demonstrations. (A-53 to 55)

In discussing disposition of a potential coercive fine imposed for violation of the TRO, Judge Ward, *without* request from the Respondents, indicated that he was planning ultimately to have the fine paid to the Respondents. The following exchange of remarks occurred:

> MR. COLE: [for the Respondents] "Well no, it is for the purpose of coercing compliance. If $25,000 doesn't work, then it is appropriate to increase the penalty. However, my understanding is that that penalty goes to the Court, not to Respondents."
>
> THE COURT: "Oh, no. The way I understand this business of coercion is that I can direct the penalty to be paid in any way I deem appropriate. Partly, I would suggest, I would be considering that the penalty be paid in such a way as to encourage compliance. I think if I may say so, the most effective way to do that would be to direct that the payments be made to the Respondent or Respondents. I don't think that is something that the petitioners would be happy with, but *I would certainly suggest that if I were made to pay someone who I considered my—, I won't say enemy, I won't say that—a person who has a different point of view who might then use the money to buy advertising space and do other things to counter-attack my attack, I think the whole thing might turn into a rather interesting political exercise. But that is for another day.* (emphasis added)

By court opinion dated October 27, 1988, Judge Ward found Petitioners Randall Terry and Operation Rescue to be in Civil Contempt of the Court's May 5th Order for demonstrations held on May 5th and 6th, 1988 and assessed a penalty of $50,000, which was ordered to be "paid to plaintiff National Organization of Women and disbursed among the remaining respondents according to its discretion." (A-104)[51]

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51 The district court additionally found Petitioners Terry and Operation Rescue liable to pay City of New York excess police costs, and subsequently ordered $19,141 to be paid by Petitioners. (A-106 to 108)

In the first instance, as subsequently held by the circuit court on appeal in this case, the district court had no authority to order coercive penalties to be paid to the Respondents. (A-27 to 29). The penalties in this case were unequivocally identified as "coercive". More importantly, the Judge's remarks on May 4th reveal with astounding clarity the court's intention to punish and coerce the Petitioners by making money available to Respondents *for the express purpose of opposing and "counterattacking" Petitioners' political beliefs*. No case, no principle of law, can support an implicitly intentional court use of the system of justice to undermine or resist the Petitioners' First Amendment cause, in order to coerce behavior. Cases regarding impermissible government discrimination against the content of First Amendment speech activity underscore this tenet.[52]

It is particularly egregious that in providing $25,000 daily fines, the court made no substantial inquiry into the financial ability of the *individual Operation Rescue participants* to pay such fines, although the court's order and threatened fines applied to every participant with actual notice. In *Dole Fresh Fruit Co.* v. *United Banana Co., Inc.*, 821 F.2d 106, 110 (2d Cir. 1987), the Second Circuit held that before imposing coercive penalties a trial court must explicitly consider (1) the character and magnitude of the harm threatened by the continued contumacy; (2) the probable effectiveness of any suggested sanction in bringing about compliance; and (3) the contemnor's financial resources and consequent seriousness of the burden of the sanction upon him."[53] In this case the court was advised that counsel believed that Petitioner Terry was essentially without funds.

But, the district court, without considering this or evaluating the other applicable standards, insisted upon levying a severe coercive penalty that ignored *the chilling effect of the*

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52 *Police Department* v. *Mosley*, 408 U.S. 92 (1972); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490 (1981); *Erznoznik* v. *Jacksonville*, 422 U.S. 205 (1975); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968).

53 *But see*, *United States* v. *Ruggiero*, 835 F.2d 443 (2d Cir. 1987) (defense attorney's silence in regard to petitioner's financial resources).

generally publicized $25,000 daily fine upon certain clearly protected First Amendment demonstration activities.[54]

Although Respondents *disingenuously* urged, and the district court went on to hold, that the highly trained and experienced New York Police Department could not cope with the Rescue demonstrations (thereby justifying the imposition of $25,000 penalties on demonstrators), the record is clear that New York Police Department, after viewing videotapes of similar Rescue sit-ins, had advised a New York State court that they were quite able to handle such demonstrations.[55]

In *Carroll* v. *Commissioners of Princess Anne*, 393 U.S. 175, 180-181 (1968), where an *ex parte* restraining order had been issued by a state court, prohibiting further rallies of a

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54 In the contempt opinion of October 27th herein, the district court recited the requirements of *Dole Fresh Fruit Co.*, *supra*, but failed however, to give specific consideration to part (1) or (2) thereof and only briefly referred to the TRO Hearing of May 4th in regard to part (3). At a further hearing conducted on May 6, 1988, Judge Ward stated: "I was well aware that the TRO was not likely to stop a group as committed as this one. Indeed, it did not. So I used what I thought was reasonable judgment." The implication of these facts in regard to part (2) of the *Dole Fresh Fruit Co.*, *supra*, requirements and in light of potential criminal charges clearly facing demonstrators for obstructing entrance to abortion clinics, point to an excessive, ineffective penalty, punishing Rescue participants acting as a matter of conscience to protest abortion and save human life. Judge Ward's tacit solicitation from Respondents that jail penalties should not be imposed, to avoid creating "martyrs," points directly to the Court's not insignificant concern with First Amendment implications of Petitioners' demonstrations, rather than applying a reasonable penalty to coerce behavior.

55 When considering a similar case where a TRO was being sought against Operation Rescue demonstrations planned in the Boston area, the United States Court of Appeals for the First Circuit *denied* the appeal of a lower court ruling against granting a preliminary injunction, indicating that the Massachusetts authorities and police could be expected to properly safeguard the rights of the Appellants and their patients. Upon a renewed motion for a temporary restraining order, after Operation Rescue demonstrations in Boston, the district court in this case again refused the requested injunction. *Planned Parenthood* v. *Operation Rescue*, Civil Action No. 88-2329-NA (D.Mass. October 19, 1988); *Planned Parenthood* v. *Operation Rescue*, Appeal No. 88-2047 (1st Cir. October 21, 1988); *Planned Parenthood* v. *Operation Rescue*, Civil Action No. 88-2329-MA (D.Mass. October 26, 1988).

"white supremacist" organization, the Supreme Court observed that:

> Ordinarily the states' constitutionally permissible interests are adequately served by *criminal penalties* imposed *after* freedom to speak has been so grossly abused that its immunity is breached. *The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint.* (Emphasis added.)

The lower courts herein had a more than reasonable basis to allow New York City authorities to enforce the law and seek criminal penalties as necessary with regard to Rescue demonstrations—as the First Circuit has decisively chosen to do. Instead, they departed from the presumption protecting political protest and the exercise of the First Amendment and imposed a severe regime of prior restraint that impermissibly chilled political protest. *The inevitable effect of the $25,000 daily fines has been reinforced by the district court's recent imposition of a total of $450,000 in new fines against 10 individuals for injunction violations, including $100,000 additional fines against Randall Terry and Operation Rescue. N.Y. State Nat. Organization for Women* v. *Terry*, No. 88 Civ. 3071, slip op. at 53-54 (S.D.N.Y. Feb. 27, 1990).

Reporting on implications of the court's decision, the New York Times noted that, "Lawyers for the National Organization for Women, as well as some of the protestors, said that potential demonstrators might be deterred from participating in demonstrations because they could be held personally liable," " 'It's a warning to individuals," said Mary G. Gundrum, an attorney at the Center for Constitutional Rights who represented N.O.W. and several clinics . . . "*Individuals are now put on notice that if they choose to participate, they will be personally liable.*' " *The New York Times*, Feb. 28, 1990, B1, col. 5. (emphasis added)

In *Spallone* v. *United States*, ____ U.S. ____ 58 U.S.L.W. 4103, 4105 (1990), this Court stated the ancient maxim in regard to coercive sanctions that "a court must exercise [t]he *least possible power* adequate to the end proposed." Quoting *Anderson* v. *Dunn*, 6 WHEAT (19 U.S.) 204, 231 (1821). "[A]

district Court, in exercising the awesome power of contempt, must turn square corners." *United States* v. *Edgerton*, 734 F.2d 913, 915 (2d Cir. 1984). "When First Amendment rights are involved we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966).

In *Pittsburgh Press Co.* v. *Human Relations Commission*, 413 U.S. 376, 390 (1973), dealing with prior restraint of advertisement, the Court characterized the effect of such conduct, stating that "[t]he special vice of a prior restraint is that communication will be suppressed, either directly or by *inducing excessive caution in the speaker* before an adequate determination that it is unprotected by the First Amendment." (emphasis added) *See also*, *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 433 (1963).

In this regard, the enormously disproportionate fines employed by the lower court herein are on their face and as applied, unconstitutional, bearing no reasonable relationship to the meager, unsubstantiated evidence of alleged harm, in the face of broad First Amendment implications of Rescue demonstrations.

B. The *O'Brien* Standard and *Spence* v. *Washington*

In *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968), it was said: "This Court has held that when 'speech' and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." The Court continued, explaining its reasoning:

> [A] government regulation is sufficiently justified [1] if it is within the constitutional power of the government; [2] if it furthers an important or substantial governmental interest; [3] *if the governmental interest is unrelated to the suppression of free expression*; [4] *and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to furtherance of that interest*. 391 U.S. at 377. (emphasis added).

In light of the trial court's express and implied intention regarding the political content of Petitioners' First Amendment activities, and the plainly excess, unjustified nature of fines imposed against Petitioners, it is evident that the court's actions fail the latter two requirements set forth in *O'Brien*.

The Supreme Court has further held:

> "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it.' "

Texas v. *Johnson*, 491 U.S. ____, 109 S.Ct. 2533, 2539 (1989), quoting *Spence* v. *Washington*, 418 U.S. 405, 410-411 (1974).

Rescue demonstrations only temporarily block entrance to abortion clinics and cannot in their own right save the lives of more than a few unborn children. (A-256 to 280) *The "expressive" component of these demonstrations is nevertheless great.* They include picketing, posters, singing, counseling and prayer, as well as a cumulative message to the world that the evil of abortion should be arrested. The question arises: Shall public demonstrations containing elements of civil disobedience or individual acts of civil disobedience for political purposes, be treated in all aspects as non-expressive conduct, deserving no First Amendment safeguards whatsoever?

The Petitioners respectfully submit that minimal protections under the First, Fifth and Fourteenth Amendments require an articulable standard of reasonableness in measuring sanctions against individuals who participate in Rescue demonstrations, particularly in light of the availability of state criminal enforcement and civil damages. Before assessing sanctions in dealing with public demonstrations containing elements of civil disobedience for political purposes, the court should give explicit consideration to the following suggested criteria:

* The character and extent of expressive conduct falling within First Amendment protection

- The probable impact of sanctions on First Amendment demonstration activity
- The probable effectiveness of suggested sanctions in bringing about compliance which cannot be achieved by normal criminal sanctions and civil remedies.

See also, United States v. *O'Brien, supra*, 391 U.S. at 376; *Dole Fresh Fruit Co.* v. *United Banana Co., Inc., supra* at 110.

VI. The Second Circuit Erred In Conferring Article III Standing on the Respondents and Respondent-Intervenor

The Petitioners have asserted, from inception, that the Respondents have no Article III standing to maintain this action, nor seek the class-wide injunctive relief that they have been granted, as the Respondents have utterly failed to plead or produce evidence of Article III direct injury. *Los Angeles* v. *Lyons*, 461 U.S. 95, 102-103 (1983). *See, Roe* v. *Operation Rescue*, No. 88-5157, slip. op. (E.D. Pa., December 19, 1988). The respondents fail to meet the required standards for organizational or representative standing, as the claim asserted "requires the participation of individual members in the lawsuit," and the necessary proof can not be presented "in a group context." *New York State Club Association* v. *City of New York*, 487 U.S. 1, ____ n.4 (1988).

The complaint filed by the City does not contain the requisite allegations of a "personal stake" in the outcome of the litigation. *See, City of Milwaukee* v. *Saxbe*, 546 F.2d 693, 698 (7th Cir. 1976) ("Unless the City has alleged an injury to itself, it can establish standing only as a representative of its citizens who have been injured in fact.") *See also, Rizzo* v. *Goode*, 423 U.S. 362, 371-73 (1976). In the absence of standing, the City had no right to invoke the district court's remedial powers and its purported pendant party claim should have been dismissed.[56] *Finley* v. *United States*, ____ U.S. ____, 109 S.Ct. 2003 (1989).

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56 *See, Prince George's County, Maryland* v. *Levi*, 79 F.R.D. 1, 5 (D.Md. 1977); *Commonwealth of Pa. ex. rel. Rafferty* v. *Philadelphia Psychiatric Center*, 356 F.Supp. 500 (E.D. Pa. 1973).

VII. The Second Circuit's Awards of Cost Under Rule 37(A)(4) Jointly And Severally Against Petitioners And Their Counsel Was Arbitrary And An Abuse Of Discretion

As the district court recited in its August 31, 1988, Order, the discovery sought by Respondents and by intervenor City of New York from Petitioners Terry and "Operation Rescue" was "in connection with their then pending contempt motion" (A-57). The discovery on its face seriously implicated Mr. Terry's Rights to Freedom of Speech, Freedom of Association, Freedom of Religion and Personal Privacy, guaranteed by the First, Fourth and Fourteenth Amendments, and his Privilege Against Self-Incrimination, guaranteed by the Fifth Amendment. Petitioners opposed Respondents' motion to compel and sought a protective order in order to preserve Mr. Terry's constitutional Rights and Privileges and to permit Petitioners to obtain a ruling on whether the Court had Article III jurisdiction before subjecting Mr. Terry, who was not sued as a party in his personal capacity, to merits discovery. Petitioners also sought to prevent respondents from using the fruits of such discovery in other actions they had brought or threatened to bring against petitioners.

The district court declined to follow this Court's decision in *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988) and summarily rejected Petitioners' request for a protective order. The court also impermissibly narrowed the constitutional protections afforded to citizens engaged in non-violent civil disobedience and public advocacy of unpopular but deeply held religious, political and moral convictions and penalized Petitioners for their attempt to assert their constitutional Rights and Privileges. Finally, the court arbitrarily imposed sanctions upon attorneys engaged in *pro bono* representation of such dissenters, thereby threatening to discourage members of the federal bar from fulfilling their professional ethical obligation to provide vigorous and fearless defense to citizens who espouse unpopular causes and seek by their protests to chal-

lenge the failure of government to remedy what they believe to be a pernicious and inhuman injustice.

The district court's imposition of costs was particularly inappropriate here because it was imposed jointly and severally on Petitioners *and their counsel*. The district court's rationale affirmed by the Second Circuit, for this extraordinary discovery sanction is that "Terry invoked privileges almost entirely on advice from his counsel." (A-36). According to Professor Moore,

> "expenses should be charged to the attorney only if the failure to make discovery was principally at his instigation." 4A J. Moore, *Federal Practice* ¶ 37,02 [10.-4] (2d ed. 1988).[57]

As the court of appeals noted in *Weisberg* v. *Webster*, 749 F.2d 864, 873-74 (D.C. Cir. 1984), even where the imposition of costs under Fed.R.Civ.P. 37(a)(4) on a party may be justified, it does not automatically follow that it is proper to impose costs on that party's attorney. Rather, specific findings of *separate grounds* are required to sustain the imposition of costs on the attorney:

> "This requirement of findings to support an award of expenses against an attorney is prompted by the structure of Rule 37, by concerns for effective appellate review, and by concerns for the tension created in the attorney-client relationship when the attorney is subject to personal liability."

Id. at 874.[58]

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57 *See also*, *Crawford* v. *American Federation of Government Employees*, 576 F.Supp. 812, 815 (D.D.C. 1983) ("an award ought to be made against the attorney only when it is clear that discovery was unjustifiably opposed principally at his instigation"); *Humphreys Exterminating Co.* v. *Poulter*, 62 F.R.D. 392, 395 (D. Md. 1974); *Hulvat* v. *Royal Indemnity Co.*, 277 F.Supp. 769, 771 (E.D. Wis. 1967).

58 *See also*, *Reygo Pacific Corp.* v. *Johnston Pump Co.*, 680 F.2d 647, 649 (9th Cir. 1982); *Stillman* v. *Edmund Scientific Co.*, 522 F.2d 798, 801 (4th Cir. 1975); *1970 Advisory Committee Note to Rule 37(a)(4)*, quoted in 4A J. Moore, *Federal Practice* ¶ 37.01 [8], pp. 37-22 to 23 (2d ed. 1988).

Moreover, where there is a legitimate dispute as to the propriety of discovery with First and Fifth Amendment implications, effective representation by counsel requires that discovery disputes be brought to the court for resolution and opposition to a motion to compel in those circumstances should be presumed to be substantially justified. *See*, *Pierce* v. *Underwood*, 487 U.S. 552 (1988). Therefore, imposition of costs on petitioners *and their counsel* here was an unwarranted abuse of discretion. *See*, *e.g.*, *Spevack* v. *Klein*, 385 U.S. 511 (1967) (prohibiting "the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.' ")

CONCLUSION

It is respectfully submitted that Petitioners' petition for certiorari should be granted and that the issues raised therein should be addressed by the justices of this Court.

Dated: March 5, 1990
New York, New York

Respectfully submitted,

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